



# U. S. Nuclear Regulatory Commission Office of Nuclear Reactor Regulation

## ***NRR OFFICE INSTRUCTION***

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### Change Notice

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Office Instruction No.: **LIC-204, Revision 3**

Office Instruction Title: **Handling Requests to Withhold Proprietary Information from Public Disclosure**

Effective Date: **January 24, 2007**

Primary Contact: **Michelle C. Honcharik**  
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Responsible Organization: **NRR/DPR/PSPB**

**Summary of Changes:** No change bars due to extensive changes. Changes include (1) updated organizational names due to Fall 2005 NRR re-organization, (2) define "submitter" and "owner" of proprietary information and clarify that responses to requests to withhold proprietary information are addressed to the submitter, not the owner, (3) refer to OI for meetings, and (4) update per SUNSI Handling Requirements.

Training: NRR awareness training within 90 days of issuance

ADAMS Accession No.: ML062200530



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Position	PM:PSPB:NR P	LA:DPR:NRR	C:PSPB:DPR:NRR	OGC
Name	MHoncharik	DBaxley	SRosenberg	CHolze for TRothchild
Date	11/27/06	11/27/06	12/01/06	10/06/06
Position	D:DPR:NRR	PIMB:PMAS:NRR	D:PMAS:NRR	
Name	MCase	AMendiola	RMitchell	
Date	12/05/06	01/22/07	01/24/07	

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**NRR OFFICE INSTRUCTION  
LIC-204, Revision 3**

**Handling Requests to Withhold Proprietary Information from Public Disclosure**

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**1. POLICY**

The NRC is required by Section 2.390(b)(3) of Title 10 of the *Code of Federal Regulations* (10 CFR) to determine whether information sought to be withheld from public disclosure is a trade secret or confidential or privileged commercial or financial information (i.e., proprietary information) and, if so, whether it should be withheld.

**2. OBJECTIVES**

This office instruction (OI) contains guidance for the review and disposition of requests to withhold proprietary information from public disclosure pursuant to 10 CFR 2.390. It is not the intent of this OI to address every circumstance. When guidance in this OI does not address the specific circumstance, the Primary Contact listed in Section 7.0 or the General Counsel for Licensing and Regulation, Legal Counsel, Legislation and Special Projects (OGC/GCLR/LCLSP) should be consulted. That OGC division also should be contacted whenever legal advice or assistance is needed. OGC concurrence on routine determinations is not required.

**3. BACKGROUND**

All proprietary submittals shall be reviewed by the staff to ensure that the basis for withholding is supportable and that the submittals comply with the affidavit and marking requirements in accordance with 10 CFR 2.390(b). Additionally, the staff reviews should ensure that the public has access to as much information as possible regarding the basis for regulatory decisions by making the non-proprietary portions of the submission available to the public. Information such as safeguards information or personal privacy information contained in the submission must be withheld from the public.

In most cases, reviews for withholding proprietary information will be made or coordinated by the Project Manager (PM). The PM should arrange for assistance and coordinate the activity to ensure continuity and a timely determination. The determination should normally be made within 60 days of the date of receipt of the material. The regulation at 10 CFR 2.390(b)(1) contains detailed requirements that the owner and submitter of the proprietary information and the NRC must follow.

Additionally, Management Directive (MD) 3.1, "Freedom of Information Act," includes guidance regarding the release of information when a proprietary determination has yet to be made by the staff. In short, the staff should not disclose information about outage schedules without providing the licensee an opportunity to determine if they want to request withholding.

**3.1 Definitions**

1. Submitter - individual or organization who submits the proprietary information to the NRC. The submitter is the applicant (e.g., a licensee). In

some instances the submitter is also the owner (e.g., a fuel vendor submits a proprietary topical report for review and approval).

2. Owner - individual or organization who owns the proprietary information. The owner of the proprietary information prepares and signs the affidavit (e.g., a fuel vendor). The owner can be, but is not necessarily, the submitter.

#### **4. BASIC REQUIREMENTS**

##### **4.1 Affidavit**

The request for withholding and the affidavit must be submitted at the same time as the proprietary information sought to be withheld. The affidavit must be notarized or signed under oath and affirmation. The factors set out in 10 CFR 2.390(b)(4) must be addressed in the affidavit, including specific reasons why the document is considered to contain proprietary information, the release of which would cause harm to the competitive position of the owner of the information.

Review of the affidavit ensures that it is complete and contains all the requirements of 10 CFR 2.390(b)(1)(ii) and (iii). The affidavit must:

1. Identify the document or part sought to be withheld;
2. Identify the official position of the person making the affidavit. Where the affidavit has been submitted by a company, this person shall be an officer or upper-level management official who has been specifically delegated the function of reviewing the information sought to be withheld and authorized to apply for its withholding on behalf of the company. Further, the affidavit shall be executed by the owner of the information, even if the information is submitted to the Commission by another person;
3. Declare the basis for proposing the information be withheld, including the considerations set forth in 10 CFR 2.390(a).
4. Contain a specific statement of the harm that would result if the information sought to be withheld is disclosed to the public;
5. Indicate the location(s) in the document of all information sought to be withheld;
6. A withholding request based on 10 CFR 2.390(a)(4) must contain a full statement of the reason for claiming the information should be withheld from public disclosure. The statement shall address, with specificity, the considerations listed in 10 CFR 2.390(b)(4).

Note that under 10 CFR 2.390(b), an affidavit is only required for documents submitted as "trade secrets and commercial or financial information" (i.e., proprietary information) under Exemption 4, but not for documents or

information falling within the other exemptions listed in 10 CFR 2.390(a). For example, a submittal containing personal privacy information (10 CFR 2.390(a)(6)) is not required to be accompanied by an affidavit. However, the request for withholding should indicate that personal privacy information is included, the document should be bracketed to indicate the personal information, and a version suitable for public disclosure should be submitted.

#### **4.2 Marking of Information Sought To Be Withheld**

The portions of the document that are claimed to be proprietary must be identified. The top of the first page of the document and the top of each page containing proprietary information must be marked with language clearly indicating that it contains proprietary information to be withheld from public disclosure under 10 CFR 2.390. The language should be similar to: "confidential information submitted under 10 CFR 2.390," "withhold from public disclosure under 10 CFR 2.390," or "proprietary." Additionally, each document or page to be withheld from public disclosure must contain, adjacent to the information, or at the top if the entire page is affected, markings to indicate the basis (i.e., proprietary) for proposing that the information be withheld under 10 CFR 2.390(a).

As discussed above, the specific basis for that withholding needs to be set forth either in the document or in the affidavit. If the document or page in question contains more than one type of information to be withheld or if the affidavit does not clearly indicate the basis for withholding, adjacent markings (i.e., subscript annotations next to each bracketed portion) of material to be withheld is required. If all the information to be withheld on a given page is proprietary and the affidavit clearly indicates the basis for the withholding request, then a marking such as "proprietary" at the top of the page is sufficient and adjacent markings of proprietary material are not necessary.

A non-proprietary version of the report or document should be submitted. In instances where a non-proprietary version would be of no value to the public due to the extent of the proprietary information, a non-proprietary version is not required to be submitted to the NRC. Absent such a finding, the submitter should provide a version that could be made available to the public. The task of providing a public version rests on the submitter, not on the NRC staff.

#### **4.3 Proprietary Determination**

If the staff determines that the information contains trade secrets and commercial or financial information that is confidential or privileged based on the 10 CFR 2.390(b)(4), then, pursuant to 10 CFR 2.390(b)(5), it must be determined: (1) whether the right of the public to be fully apprised of the proposed action outweighs the demonstrated concern for protection of a competitive position; and (2) whether the information should be withheld.

The PM should be able to answer "Yes" to each of the following questions to determine if the information should be withheld:

1. Was the information held in confidence by the owner?
2. Is the information of a type normally held in confidence?
3. Was the information sent to and received by the NRC in confidence?
4. Is the information not publicly available?
5. Is public disclosure likely to cause harm to the owner of the information?

If any of the answers are "No," the withholding may be denied. If all of the answers are "Yes," the PM should prepare an approval letter addressed to the submitter. The owner of the information should be sent a courtesy copy if appropriate. Sample letters are contained in the Agencywide Documents Access and Management System (ADAMS) at Package Accession No. ML062080003.

Correspondence and reports that identify procedures for the physical protection of a licensed facility, or information submitted in confidence by a foreign government or company owned by a foreign government, are automatically deemed to meet the requirements for withholding from public disclosure (10 CFR 2.390(d)).

A different criterion is used to evaluate whether a voluntary submittal contains proprietary information. A voluntary submittal is one that is submitted to the Commission for information only and is not legally required to be submitted nor retained for inspection and is not related to a request for NRC review and approval of an application or a document or for any other NRC decision. Therefore, only a limited class of documents constitute voluntary submittals. For those that are, the NRC can determine whether the documents are proprietary after determining that such documents are customarily held in confidence by the owner. The findings that are normally made for other proprietary requests are not required for voluntary submittals.

Irrelevant or unnecessary information should be returned to the owner in accordance with 10 CFR 2.390(b)(5).

#### **4.4 Required Documentation**

After making the determination, the PM will prepare a letter notifying the submitter of the approval or rejection of the request. A courtesy copy should be sent to the owner of the information if appropriate. Concurrence and signature of this letter should be consistent with ADM-200, "Delegation of Signature Authority," and should be issued within 60 days of receipt of the information. Sample letters for requesting clarification or additional justification, approval, and rejection can be found in ADAMS at Package Accession No. ML062080003. If the request for withholding is rejected, the submitter may request that the document(s) be withdrawn and not made available to the public. The PM should coordinate with OGC/GCLR/LCLSP to determine whether the document and all copies can be returned to the submitter. If the withdrawal request is granted, the

document is removed from the ADAMS in accordance with NUREG/BR-0273, "ADAMS Desk Reference Guide," and returned to the submitter. If withdrawal is not requested following a rejection letter, and mutual agreement of some other resolution is not reached, the PM will consult with OGC/GCLR/LCLSP and take action under 10 CFR 2.390(c) to issue a memorandum to the Chief, Records and FOIA/Privacy Services Branch, Information and Records Services Division, Office of Information Services, to make the information publicly available. There are certain circumstances wherein a request for withdrawal cannot be honored. These are listed in 10 CFR 2.390(c)(3). For example, if a Freedom of Information Act request for the document is pending, the document cannot be withdrawn. Information submitted in rulemaking proceedings, which subsequently forms the basis for the final rule, will not be withheld from disclosure by the NRC, nor will it be returned to the submitter of the information. In addition, if the document(s) contains an allegation or the information the staff determines necessary to resolve an allegation, the document cannot be withdrawn. However, the documents should be removed from ADAMS and will be kept only in the NRC's allegation files and treated in accordance with NRC allegation program requirements. The PM should consult with the Office Allegation Coordinator for guidance. Legal questions should be referred to OGC/GCLR/LCLSP.

Normally the request for withholding, affidavit, and correspondence about the request for withholding are made available to the public. However, if the staff determines that a submittal contains an allegation, the submitter will be informed and the documents treated in accordance with the NRC allegation program guidance. In such cases, the request for withholding, affidavit, and letters are typically not made publicly available. In NRC's correspondence with the submitter of proprietary information, any proprietary questions or other statements containing proprietary information should be placed in an enclosure to the letter so that the cover letter may be placed in the public domain while the enclosure is not.

Proprietary information is defined to be sensitive per the glossary of MD 12, "Security." Therefore, per the Sensitive Unclassified Non-Safeguards Information (SUNSI) Handling Requirements webpage (<http://www.internal.nrc.gov/sunsi.html>), NRC staff shall profile proprietary documents in ADAMS as non-publicly available and sensitive.

#### **4.5 Proprietary Material used in NRC Meetings**

There are two categories of meetings where it is necessary to hand out and discuss material considered to be proprietary. See COM-202, "Meetings With Applicants, Licensees, Vendors or Other Members of the Public" and MD 3.5, "Attendance at NRC Staff Sponsored Meetings" for more detailed guidance regarding meetings.

- (a) *Meetings where the staff has already made a determination.* The meeting material, which may constitute documentation in a new format (e.g., slides,

view graphs, handouts), does not require its own affidavit as long as the content of this material is the same as was previously deemed proprietary by the staff. See Section 4.9 - Time Limits on Proprietary Documents.

- (b) *Meetings where the staff has not previously made a determination.* The licensee/vendor should submit preliminary proprietary information with an affidavit sufficiently in advance (normally 30 days) so that the staff can have a basis for closing the proprietary portions of the meeting to the public. This information can, but does not have to be, the final meeting material. However, it must contain enough specificity to enable the staff to make a determination. The final meeting materials discussed at the meeting must contain the same content as the preliminary information, but do not necessarily have to be in the same form.

NRC meetings with licensees that are open to the public should be noticed at least 10 calendar days in advance. If portions of the meeting are to be closed, the meeting notice must so indicate.

If for any reason the staff is unable to determine that the material in question is proprietary, the submitter must be notified that no portion of the meeting can be closed to public observation.

The staff should also require the licensee, vendor, or industry group to provide an affidavit for any meeting for which they want to restrict public access and at which no written material will be presented but rather only verbal information of a proprietary nature.

#### **4.6 Proprietary Correspondence**

Proprietary information can be stored in an area that is secured by key card access and should be clearly marked as containing proprietary information to ensure proper handling and protection. The proprietary material must be mailed in an opaque envelope. Only one opaque envelope is needed. The envelope must not bear any markings or indication that the document contains proprietary information. The proprietary material may only be sent to those who have a need to know (for example, the addressee and the originator/PM/reviewer). Interoffice envelopes may not be used for transmittal of proprietary documents.

Documents (e.g., cover letters or memoranda) that do not in themselves contain proprietary information but are used to transmit one or more documents containing proprietary information must be marked to indicate that proprietary information is contained in the documents transmitted. The marking "Official Use Only - Proprietary Information" must be placed at the top and bottom of all pages of the transmittal document. Additionally, the following statement must be placed at the bottom of the transmittal document:

Document transmitted herewith contains sensitive unclassified information. When separated from enclosure(s), this document is decontrolled.

A draft Safety Evaluation (SE) documenting the staff's review of a proprietary report may be transmitted to the submitter for determining whether the staff has included proprietary information in the SE. This transmittal letter should clearly state that the requested review is in regard to proprietary information only. The transmittal letter should be made available to the public, and the enclosed SE should be withheld from the public until the submitter confirms that there is no proprietary information in the SE. When an SE or other staff report contains proprietary information, a non-proprietary version should also be prepared by the staff, if practicable, to be placed in the public domain.

Sample letters for transmitting draft SEs can be found in ADAMS at Package Accession No. ML062080003. Proprietary information is defined to be sensitive per MD 12. Therefore, per the SUNSI handling requirements, NRC staff shall profile proprietary documents in ADAMS as non-publicly available and sensitive.

#### **4.7 Transmittal of Proprietary Documents**

When transmitting information to consultants or contractors, a nondisclosure agreement must be signed and returned to the NRC prior to its release. OGC/GCLR/LCLSP must be consulted during the preparation of this agreement. Sample nondisclosure agreements can be obtained from OGC and are in ADAMS at Package Accession No. ML062080003.

E-mail may be used to transmit proprietary information outside the NRC only if a need-to-know exists and the proprietary information is encrypted using SecureZip.

#### **4.8 OGC**

OGC advice may be sought where the staff desires legal advice on a withholding determination. While it is not expected that OGC views will be sought in routine cases, OGC review is required on all:

- 1) Determinations to release information over a submitter's objection;
- 2) Cases involving a dispute that the staff cannot resolve with the submitter;
- 3) Any voluntary submittals;
- 4) Controversial or high-visibility cases that are likely to receive Commission or senior management attention;

- 5) Requests by the submitter to withdraw a document from NRC consideration;  
and
- 6) Nondisclosure agreements with consultants or contractors prior to release of the document to them.

#### **4.9 Time Limits on Proprietary Documents**

It is not possible to grant a blanket approval of proprietary information used or referenced repeatedly over a period of time, in part, because the criteria for withholding are time-dependent. In each case, the complete review, as described in this procedure, will be made the first time the information is submitted. Any extracted information from a proprietary document with a proprietary determination more than one year old should be accompanied by a new affidavit listing the current reasons for withholding. Revised or updated documents are considered newly submitted and must also be accompanied by an affidavit. A document that is merely listed as a bibliographical reference does not require a new affidavit. The PM or technical reviewer will review in accordance with normal procedures and issue a letter to the submitter of the information.

#### **4.10 Recovering from an Inadvertent Proprietary Release**

If a proprietary document is inadvertently released to the public in ADAMS, e-mail ADAMSIM immediately to have the document removed from public access. Refer to ADM-304, "ADAMS Document Submission and Use" for follow-up actions.

### **5. RESPONSIBILITIES AND AUTHORITIES**

#### **All NRR Staff Members**

All staff members who receive proprietary information are to ensure that these procedures are followed and that a proprietary determination is issued to the submitter by the NRC. Moreover, all employees should ensure that there is a "need to know" before releasing proprietary information to other staff members.

#### **Signature Authority**

Signature authority shall be consistent with ADM-200, "Delegation of Signature Authority."

Project Manager or Technical Reviewer

The PM or technical reviewer is responsible for the evaluation and generation of a proprietary determination (approval or disapproval) to the submitter of the document.

Branch Chief

The Branch Chiefs for the PM and technical reviewer(s) concur on the proprietary determination.

6. **PERFORMANCE MEASURES**

None defined at this time.

7. **PRIMARY CONTACT**

Michelle C. Honcharik  
NRR/DPR/PSPB  
301-415-1774  
mch3@nrc.gov

8. **RESPONSIBLE ORGANIZATION**

NRR/DPR/PSPB

9. **EFFECTIVE DATE**

January 24, 2007

10. **REFERENCES**

- 10 CFR 2.390, "Public inspections, exemptions, requests for withholding"
- Management Directive 3.1, "Freedom of Information Act," 5 USC 552; 10 CFR Part 9
- ADM-200, "Delegation of Signature Authority"
- Glossary to Volume 12, "Security," of the Management Directive System
- NUREG/BR-0273, "ADAMS Desk Reference Guide"
- Sensitive Unclassified Non-Safeguards Information (SUNSI) Handling Requirements webpage (<http://www.internal.nrc.gov/sunsi.html>)

- COM-202, "Meetings With Applicants, Licensees, Vendors or Other Members of the Public"
- Management Directive 3.5, "Attendance at NRC Staff Sponsored Meetings"
- Management Directive 12.6, "NRC Sensitive Unclassified Information Security Program"
- ADM-304, "ADAMS Document Submission and Use"

Attachments:

1. Table of Sample Letters
2. Appendix A: Change History

### Table of Sample Letters

Sample Letter	ADAMS Accession Number
Approval letter when a non-proprietary version was provided	ML062080078
Approval letter when a non-proprietary version was NOT provided	ML062080083
Letter requesting additional justification for withholding	ML062080106
Letter rejecting request to withhold proprietary information	ML062080090
Letter transmitting proprietary information to a contractor/consultant (non-disclosure agreement) - OGC review is required	ML062080054
Letter transmitting a draft safety evaluation of a submittal which contained proprietary information	ML062080129

## Appendix A - Change History

### Office Instruction LIC-204, Revision 3 "Handling Requests to Withhold Proprietary Information from Public Disclosure"

<b>LIC-204, Revision 3, Change History</b>			
<b>Date</b>	<b>Description of Changes</b>	<b>Method Used to Announce &amp; Distribute</b>	<b>Training</b>
06/30/2001	Initial Issuance	E-mail to NRR staff	Training on LIC-204 to PMs and LAs in DLPM and RLSB within 90 days of issuance
11/08/2002	Changes in Revision 1 include (1) revised the title and content of section 4.7, "Discussion of Proprietary Material Provided at NRC Meetings with Licensees and Vendors" to provide clarification on the handling of proprietary material during meetings, (2) removal of Appendix B sample letters, inclusion of a reference to approved examples on <b>R:\DLPM Boilerplates</b> , and editorial changes in the procedure to reflect these changes, and (3) various updates and editorial changes.	E-mail to NRR staff	Training on LIC-204 to PMs and LAs in DLPM and RLSB within 90 days of issuance
04/02/2004	No change bars due to extensive changes. Changes include (1) updated roles and responsibilities, (2) updated changes to 2.790, (3) handling proprietary e-mails, and (4) removal of unnecessary restrictions	E-mail to NRR staff	Training on LIC-204 to PMs and LAs in DLPM and RLSB within 90 days of issuance

<b>LIC-204, Revision 3, Change History</b>			
<b>Date</b>	<b>Description of Changes</b>	<b>Method Used to Announce &amp; Distribute</b>	<b>Training</b>
01/26/2007	No change bars due to extensive changes. Changes include (1) updated organizational names due to fall 2005 NRR re-organization, (2) define "submitter" and "owner" of proprietary information and clarify that responses to requests to withhold proprietary information are addressed to the submitter, not the owner, (3) refer to OI for meetings, and (4) update per SUNSI Handling Requirements.	E-mail to NRR staff	Training on LIC-204 to PMs and LAs in DORL, DPR, DLR, and DNRL.